No. 01-1325

Supreme Court U.S.
FILED
OCT 18 2002
OFFICE OF THE CLERK

In The
Supreme Court of the United States

WASHINGTON LEGAL FOUNDATION, *et al.*,
Petitioners,

v.

LEGAL FOUNDATION OF WASHINGTON, *et al.*,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATES OF CALIFORNIA, MASSACHUSETTS, ARIZONA, COLORADO, CONNECTICUT, FLORIDA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WEST VIRGINIA AND COMMONWEALTH OF PUERTO RICO, AS AMICI CURIAE SUPPORTING RESPONDENTS

BILL LOCKYER
Attorney General of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
*DANIEL L. SIEGEL
Supervising Deputy Attorney General
CHRISTIANA TIEDEMANN
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-9259
**Counsel of Record*

THOMAS F. REILLY
Attorney General of Massachusetts
WILLIAM W. PORTER
AMY SPECTOR
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
Telephone: (617) 727-2200

[Additional Counsel Listed On Inside Cover]

BEST AVAILABLE COPY

37 pp

JANET NAPOLITANO
Arizona Attorney General

KEN SALAZAR
Colorado Attorney General

RICHARD BLUMENTHAL
Connecticut Attorney General

ROBERT A. BUTTERWORTH
Florida Attorney General

EARL I. ANZAI
Hawaii Attorney General

JAMES E. RYAN
Illinois Attorney General

STEVE CARTER
Indiana Attorney General

THOMAS J. MILLER
Iowa Attorney General

CARLA J. STOVALL
Kansas Attorney General

RICHARD P. IEYOUB
Louisiana Attorney General

G. STEVEN ROWE
Maine Attorney General

J. JOSEPH CURRAN, JR.
Maryland Attorney General

JENNIFER M. GRANHOLM
Michigan Attorney General

MIKE HATCH
Minnesota Attorney General

MIKE MOORE
Mississippi Attorney General

MIKE MCGRATH
Montana Attorney General

FRANKIE SUE DEL PAPA
Nevada Attorney General

PHILIP T. MCLAUGHLIN
New Hampshire Attorney General

DAVID SAMSON
New Jersey Attorney General

PATRICIA A. MADRID
New Mexico Attorney General

ELIOT SPITZER
New York Attorney General

ROY COOPER
North Carolina Attorney General

WAYNE STENEHJEM
North Dakota Attorney General

BETTY D. MONTGOMERY
Ohio Attorney General

W.A. DREW EDMONSON
Oklahoma Attorney General

HARDY MYERS
Oregon Attorney General

D. MICHAEL FISHER
Pennsylvania Attorney General

SHELDON WHITEHOUSE
Rhode Island Attorney General

CHARLIE CONDON
South Carolina Attorney
General

MARK BARNETT
South Dakota Attorney
General

PAUL G. SUMMERS
Tennessee Attorney General

MARK L. SHURTLEFF
Utah Attorney General

WILLIAM H. SORRELL
Vermont Attorney General

DARRELL V. MCGRAW, JR.
West Virginia Attorney
General

ANABELLE RODRIGUEZ
Attorney General
Commonwealth of
Puerto Rico

QUESTIONS PRESENTED

1. Whether Washington's Interest on Lawyers Trust Accounts (IOLTA) rule effects a taking under the Fifth Amendment's Takings Clause even though it has no economic impact on the property owner?

2. Whether injunctive relief is available under the Fifth Amendment's Takings Clause where there is no economic loss to the property owner?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
INTEREST OF THE AMICI STATES	1
A. The States' Substantial Interest in Regulating the Practice of Law Would Be Severely Undermined by the Extension of *Per Se* Takings Rules to the Regulation of Client Trust Accounts	2
B. IOLTA Programs Serve the States' Vital Interests in Providing Equal Access to the Courts and in Improving the Administration of Justice	4
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. THE *PER SE* TAKINGS RULES SHOULD NOT BE EXTENDED TO A REGULATION GOVERNING FUNDS THAT CANNOT PRODUCE NET INTEREST FOR THE PROPERTY OWNER	7
A. Application of a *Per Se* Test to IOLTA Funds Would Be an Unwarranted Extension of the Present Categorical Tests, Which Derive From the Unique Nature of Property Interests in Land	7
B. A *Per Se* Taking Should Never Be Found Where, as Here, Application of the Traditional Ad Hoc Balancing Test Would Produce a Different Result	11
C. Petitioners' *Per Se* Rule Would Disregard a Consensus Among the States and Invite Judicial Oversight of State Policy Choices	13

TABLE OF CONTENTS – Continued

	Page
D. If a *Per Se* Test Is Extended to Rules, Like IOLTA, That Affect Only the Use of Intangible Personal Property But Have No Economic Impact, Virtually Any Police Power Regulation Could Be Subject to Challenge Under the Takings Clause	15
II. THERE IS NO CONSTITUTIONAL VIOLATION TO BE REMEDIED THROUGH INJUNCTIVE RELIEF	18
A. The Takings Clause Is a Compensatory Constitutional Provision Rather Than a Substantive Limit on Government Power	18
B. There Is No Unconstitutional Taking Within the Meaning of the Takings Clause Unless the Property Owner Is Entitled to Just Compensation	20
C. Injunctive Relief Is Unavailable Because the Washington State Courts Can, and Should, Decide Any Question of Just Compensation	23
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

Albright v. Oliver, 510 U.S. 266 (1994) 25

Agins v. City of Tiburon, 447 U.S. 255 (1980) 19

Armstrong v. United States, 364 U.S. 40 (1960) 12

Babbitt v. Youpee, 519 U.S. 234 (1997) 24

Boston Chamber of Commerce v. City of Boston, 217 U.S. 189 (1910) 21

Bowen v. Massachusetts, 487 U.S. 879 (1988) 9

Bowles v. Willingham, 321 U.S. 503 (1944) 17

Branch v. United States, 69 F.3d 1571 (Fed. Cir. 1995) 16

City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687 (1999) 18

City of Pittsburgh v. Alco Parking Corp., 417 U.S. 369 (1974) 16

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) ... 9, 20, 24

Federal Maritime Commission v. South Carolina State Ports Authority, 122 S.Ct. 1864 (2002) 14

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) 18

Gideon v. Wainwright, 372 U.S. 335 (1963) 5

Gilmore v. State, 143 N.Y.S.2d 873 (Ct. Cl. 1955) 22

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 3

Griswold v. Connecticut, 381 U.S. 479 (1965) 15

Hudson v. Palmer, 468 U.S. 517 (1984) 25

TABLE OF AUTHORITIES – Continued

Page

In re Petition of Minn. State Bar Ass'n, 332 N.W.2d 151 (Minn. 1982) 3

Keller v. State Bar of California, 496 U.S. 1 (1990) 4

Lake County Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 26

Lassiter v. Dept. of Social Services, 452 U.S. 18 (1980) 5

Lathrop v. Donohue, 367 U.S. 820 (1961) 4

Legal Services Corp. v. Velazquez, 531 U.S. 533 (2001) 5

Leis v. Flynt, 439 U.S. 438 (1979) 3, 17

Loretto v. Group W. Cable, 522 N.Y.S.2d 543 (Sup. Ct. 1987) 23

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) ..... *passim*

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 7, 10, 11, 13

Marion & R.V.R. Co. v. United States, 270 U.S. 280 (1926) 21

Matter of Interest on Lawyers' Trust Acc., 672 P.2d 406 (Utah 1983) 3

Matter of Interest on Trust Accounts, 538 So.2d 448 (Fla. 1989) 3

Olson v. United States, 292 U.S. 246 (1934) 21

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 7, 11

Parratt v. Taylor, 451 U.S. 527 (1981) 25

TABLE OF AUTHORITIES – Continued

Page

Penn Central Transp. Co. v. New York City, 438 U S. 104 (1978) ..... *passim*

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987) 24

Permian Basin Area Rate Cases, 390 U.S. 747 (1968) 16

Petition by Massachusetts Bar Ass'n, 478 N.E.2d 715 (Mass. 1985) 3

Petition of New Hampshire Bar Ass'n, 453 A.2d 1258 (N.H. 1982) 3

Phillips v. Washington Legal Foundation, 524 U.S. 156 (1998) 2, 13

Powell v. Alabama, 287 U.S. 45 (1932) 5

Preseault v. ICC, 494 U.S. 1 (1990) 24

Redevelopment Agency v. Tobriner, 215 Cal.App.3d 1087 (1989) 22

Rizzo v. Goode, 423 U.S. 362 (1976) 25

Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 23

SGB Financial Services, Inc. v. City of Indianapolis, 235 F.3d 1036 (7th Cir. 2000) 25, 26

Sintra v. City of Seattle, 829 P.2d 765 (Wash. 1992) 24

Stefanelli v. Minard, 342 U.S. 117 (1951) 25

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 13

Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency, 122 S.Ct. 1465 (2002) 7, 8, 11, 17

United States v. Sperry Corp., 494 U.S. 52 (1989) 8, 16

TABLE OF AUTHORITIES – Continued

Page

United States v. Virginia Electric Co., 365 U.S. 624 (1961) 20

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 9

Williamson v. Lee Optical of Oklahoma, 348 U.S. 483 (1955) 15

Williamson Planning Commn. v. Hamilton Bank, 473 U.S. 172 (1985) 19, 24, 25

Yee v. City of Escondido, 503 U.S. 519 (1992) 8

Zinermon v. Burch, 494 U.S. 113 (1990) 25

OTHER AUTHORITIES

2A Scott on Trusts (1987 and 2002 Supp.) §§ 181, 182 14

ABA Model Code of Professional Responsibility DR 9-102(A) (1970) 2

ABA Committee on Ethics and Professional Responsibility, Formal Opinion 348 (1982) 3

Florida Bar Rule 5-1.1(g) (2002) 2

Indiana Professional Conduct Rule 1.15(d) (2000) 2

IOLTA Handbook (2001) 2, 5

Restatement (First) of Property § 508, com. c, illus. 2 22

INTEREST OF THE AMICI STATES

Petitioners seek an expansion of the Takings Clause that would have serious, far-reaching consequences for the amici States. First, although petitioners have suffered no economic loss under the Washington IOLTA rule, nor forfeited any pre-existing right to control nominal amounts of interest earned on their funds, they ask the Court to adopt a new *per se* test under which the IOLTA rule is adjudged a taking based purely on judicial assessment of its "character." Second, although the sole province of the Takings Clause is to provide just compensation, petitioners – who suffered no loss – seek federal injunctive relief against the operation of the state IOLTA program, offending both the textual limits of the Clause and core principles of federalism.

Such a dramatic expansion of the Takings Clause would seriously disrupt the States' ability to regulate the practice of law and, more broadly, could undermine well-settled exercises of the police power affecting the use or disposition of personal property. Petitioners' proposed *per se* rule, divorced as it is from an assessment of economic impact and a property owner's reasonable expectations, is a broad invitation to judicial second-guessing of the reasonable choices made by the States in adopting IOLTA programs. The amici States urge the Court to reject petitioners' effort to reshape so fundamentally the Takings Clause.

A. The States' Substantial Interest in Regulating the Practice of Law Would Be Severely Undermined by the Extension of *Per Se* Takings Rules to the Regulation of Client Trust Accounts.

Interest on Lawyers Trust Accounts (IOLTA) rules have been established in each State as a function of the States' traditional role in regulating the legal profession.[1] State codes governing lawyers' professional conduct have long required that lawyers place clients' funds in bank accounts separate from the lawyers' funds, primarily to safeguard client property and to avoid commingling. *See* ABA Model Code of Professional Responsibility, DR 9-102(A) (1970). By their terms, the States' IOLTA rules apply *only* to client funds that are so small in amount or held so briefly that they cannot produce net interest for an individual client, after consideration of the various costs related to establishing and maintaining the account. *See, e.g.*, Fla. Bar Rule 5-1.1(g) (2002). Historically, lawyers held these same nominal or short-term client funds in a pooled, non-interest bearing checking account such that "the depository institutions have had the use of the funds without payment of any interest." ABA Comm. on Ethics

[1] Florida established the first IOLTA program in 1981. At the time of this Court's decision in *Phillips v. Washington Legal Foundation*, 524 U.S. 156 (1998), forty-nine of the States had adopted IOLTA programs. *Id.* at 159-161 and n.1. Indiana, the last State to do so, adopted an IOLTA program in 2000. Ind. Prof. Conduct R. 1.15(d) (2000). IOLTA programs also exist in the District of Columbia and the United States Virgin Islands. American Bar Association Commission on Interest on Lawyers' Trust Accounts, IOLTA Handbook (2001) ("IOLTA Handbook") at 1.

and Prof. Resp., Formal Op. 348 (1982).[2] Under IOLTA rules, lawyers are required or permitted to place such funds in a pooled, interest-bearing account, with the aggregate net interest paid to bar foundations or similar entities for distribution to programs that support the administration of justice.

State courts adopting IOLTA rules have invariably determined that they cause no economic harm to clients and contravene no ethical or fiduciary obligation of attorney to client. *See, e.g., Matter of Interest on Trust Accounts*, 538 So.2d 448, 452-53 (Fla. 1989); *Petition by Massachusetts Bar Ass'n*, 478 N.E.2d 715, 718-19 (Mass. 1985); *Matter of Interest on Lawyers' Trust Acc.*, 672 P.2d 406, 407 (Utah 1983); *In re Petition of Minn. State Bar Ass'n*, 332 N.W.2d 151, 157-58 (Minn. 1982); *Petition of New Hampshire Bar Ass'n*, 453 A.2d 1258, 1260 (N.H. 1982). Thus, petitioners' proposed *per se* rule would seriously undermine the States' sovereign interests in an area particularly reserved for their control – the practice of law. "Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions." *Leis v. Flynt*, 439 U.S. 438, 442 (1979). *See also Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("[A]s part of their power to protect the public health, safety, and other valid interests [the States] have broad power to establish standards for . . . regulating the practice of professions.").

[2] Ethical considerations prohibit lawyers from keeping for themselves interest earned on any client funds. ABA Formal Op. 348.

Moreover, by placing nominal and short-term client funds in interest-bearing accounts, IOLTA rules benefit clients by decreasing the possibility that attorneys would keep potentially productive client funds in a non-interest bearing account to gain favorable treatment from the bank for the attorney or firm. According to petitioners, that incentive to act in conflict with a client existed in the instant case, until it was diminished by the extension of the Washington IOLTA rule to Limited Practice Officers (LPOs) at escrow companies.

B. IOLTA Programs Serve the States' Vital Interests in Providing Equal Access to the Courts and in Improving the Administration of Justice.

By providing for interest on pooled accounts containing nominal and short-term funds – funds that historically earned no interest – IOLTA programs further the States' vital interest in improving the quality and availability of legal services to the public. *See Lathrop v. Donohue*, 367 U.S. 820, 843 (1961) (plurality) ("improving the quality of legal service available to the people of the State . . . is a legitimate end of state policy"). *See also Keller v. State Bar of California*, 496 U.S. 1, 13-14 (1990).

The ends served by IOLTA rules – providing equal access to the courts and improving the administration of justice – are so universally embraced that each of the fifty States has implemented the program in some fashion. *See supra* n.1. Through IOLTA programs, the States advance their substantial interest in the provision of legal services

to persons who cannot afford to hire a lawyer, thereby giving tangible meaning to the principle of equal justice under law.[3] In addition to funding legal services programs, IOLTA funds support other programs aimed at improving the administration of justice, including alternative dispute resolution programs, victim services programs, and legal education programs. IOLTA Handbook at 1-2.

The Court has emphasized the importance of providing legal representation to the poor. *See Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.") quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932). The States have important interests in ensuring representation for the poor even in circumstances in which it is not constitutionally required. *See Lassiter v. Dept. of Social Services*, 452 U.S. 18, 33 (1980) (appointment of counsel for indigent parents is not constitutionally required in every parental status proceeding, although "[a] wise public policy . . . may require that higher standards be adopted than those minimally tolerable under the Constitution"). The impartial administration of justice by our Nation's courts is best served when litigants have access to counsel. *See Legal Services Corp. v. Velazquez*, 531 U.S. 533, 545 (2001) ("An informed, independent judiciary presumes an informed,

---

[3] IOLTA programs are critical to the States in ensuring equal access to the courts through the provision of legal services to indigent persons. IOLTA programs generated over $148 million nationwide in the year 2000 through interest on nominal or short-term client funds – funds that would otherwise have remained unproductive in non-interest-bearing accounts. IOLTA Handbook at 95.

independent bar."). These are the ends that amici States seek to further under their respective IOLTA programs.

SUMMARY OF ARGUMENT

Since the Takings Clause, at its core, concerns fairness and justice, this Court has been very reluctant to adopt new *per se* rules that jettison the weighing of factors articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978). That reluctance is particularly justified in this case, where petitioners are attempting to use the Takings Clause not to obtain "just compensation," but to override the decisions of each and every state in the Union. Petitioners' attempt to expand *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) – which held that a regulation imposing a physical occupation of real property was a *per se* taking – to the Washington IOLTA rule – which involves only intangible personal property and imposes absolutely no financial burden on petitioners – simply goes too far.

Moreover, in seeking injunctive relief where they have suffered no damage or loss, petitioners seek to transform the compensatory Takings Clause into a new, substantive limit on government power. This transformation is not authorized by the plain language of the Fifth Amendment or by decisional law. Petitioners' remedy for an alleged taking of their property is a state court action for determination of just compensation. That just compensation might be nothing, because petitioners have suffered no loss, does not allow petitioners to invoke federal power to enjoin the IOLTA program.

ARGUMENT

I. THE *PER SE* TAKINGS RULES SHOULD NOT BE EXTENDED TO A REGULATION GOVERNING FUNDS THAT CANNOT PRODUCE NET INTEREST FOR THE PROPERTY OWNER.

A. Application of a *Per Se* Test to IOLTA Funds Would Be an Unwarranted Extension of the Present Categorical Tests, Which Derive From the Unique Nature of Property Interests in Land.

The "polestar" for determining whether a governmental regulation constitutes a taking is the ad hoc factual inquiry outlined in *Penn Central Transp. Co.*, 438 U.S. at 104, 123-24. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 122 S.Ct. 1465, 1486 (2002), *quoting Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring). This Court has carved out only two narrow exceptions to the fact-specific review set forth in *Penn Central*. First, regulations that result in a "permanent physical occupation" of property will be deemed to result in a taking "without regard to other factors that a court might ordinarily examine." *Loretto*, 458 U.S. at 419, 432. Second, such "categorical treatment" is also appropriate "where regulation denies all economically beneficial or productive use of land." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992). Both exceptions derive from recognition of the unique value of land and, consequently, provide no justification for extending *per se* treatment to the regulation of client trust accounts.

Loretto reviewed a regulation that mandated the permanent, physical occupation of real property – the

placement of cable television equipment in private apartment buildings. The Court explained that the complex weighing of *Penn Central* factors was unnecessary because "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking." 458 U.S. at 426-27. *Loretto* described a permanent physical occupation of property as "qualitatively more intrusive than perhaps any other category of property regulation," *id.* at 346, and noted that "[e]arly commentators viewed a physical occupation of real property as the quintessential deprivation of property." *Id.* at 430 n.7. The Court stressed that its exception to the generally applicable analysis set forth in *Penn Central* was "very narrow," *id.* at 441, and should not raise significant evidentiary problems because "[t]he placement of a fixed structure on land or real property is an obvious fact that will rarely be subject to dispute." *Id.* at 437. *See also Tahoe-Sierra Preservation Council*, 122 S.Ct. at 1479 (noting that "physical appropriations are relatively rare [and] easily identified").

The Court has steadfastly refused to apply the *per se* rule articulated in *Loretto* beyond the required, permanent, physical occupation of real property. *See, e.g., Yee v. City of Escondido*, 503 U.S. 519, 530 (1992). In particular, the Court has declined to extend the rule to laws that create monetary liability or allegedly "take" money, finding the rule's rationale – that the physical invasion of one's land is particularly grievous – plainly inapplicable. In *United States v. Sperry Corp.*, 494 U.S. 52 (1989), the Court held that the deduction of a percentage fee by the United States from monetary awards was not a taking, where the deduction was designed to offset the government's administrative costs. Citing *Loretto*, the claimant

argued that "[t]he deduction was akin to a 'permanent physical occupation' of its property and therefore was a *per se* taking requiring just compensation, regardless of the extent of the occupation or its economic impact." *Id.* at 62 n.9. The Court unanimously rejected the claimant's attempt to equate the occupation of real property with a fee requirement, finding it "artificial to view deductions of a percentage of a monetary award as physical appropriations of property. *Unlike real or personal property, money is fungible.*" *Id.* (emphasis added).[4] *See also Eastern Enterprises v. Apfel*, 524 U.S. 498, 530 (1998) (plurality) (retroactive monetary liability "is not, of course, a permanent physical occupation of Eastern's property of the kind that we have viewed as a *per se* taking").

The effect of IOLTA rules is neither similar nor analogous to the permanent physical occupation of real property discussed in *Loretto*, 458 U.S. at 434. There, a *per se* rule dispensed with the normal review of investment-backed expectations because "property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property." *Id.* at 436. Petitioners, however, have never had an expectation of undisturbed possession of the potential interest generated by the IOLTA accounts.[5] Petitioners identify no

---

[4] *Cf. Bowen v. Massachusetts*, 487 U.S. 879, 919 n.3 (1988) (Scalia, J., dissenting) ("Suit for a sum of money is to be distinguished from suit for specific currency or coins in which the plaintiff claims a present possessory interest. . . . Respondent seeks *fungible funds*, not any particular notes in the United States Treasury.") (emphasis added).

[5] In *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), upon which petitioners rely, the fact that "Webb's creditors . . . had more than a unilateral expectation" of receiving interest –

(Continued on following page)

scenario – because there is none – under which their short-term or nominal funds on deposit with counsel could have earned net interest for them. And prior to the adoption of IOLTA rules, the potential interest simply redounded to the benefit of the bank. Thus, in sharp contrast to the owners of real property, IOLTA clients never had any expectation that they would have "undisturbed . . . possession" of pooled account interest.

Moreover, *Loretto* justified applying a *per se* rule to physical occupations, regardless of the extent of economic impact, because economic impact would be addressed later on remand when the state court determined just compensation. *Loretto*, 458 U.S. at 437-38. In our case, however, petitioners' *per se* rule would do much more than "determin[e] whether there is a taking in the first instance." *Id.* at 438. Petitioners seek to use a *per se* rule to avoid consideration of whether compensation is due because their economic loss is zero. (Pet. App. 41a). But that very compensation determination is what makes the application of a *per se* rule, as opposed to the usual *Penn Central* analysis, acceptable in certain limited circumstances. *Loretto*, 458 U.S. at 437-38.

This Court's decision in *Lucas* also emphasized the unique role of land – and the very different treatment of personal property – under the Takings Clause. The Court explained that, in contrast to land, "in the case of personal property, by reason of the State's traditionally high degree of control over commercial dealing, [the owner] ought to be

---

indeed over $100,000 in interest – from an interpleader account was critical to the Court's finding a taking.

aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)." 505 U.S. at 1027-28. Petitioners' *per se* rule would ignore the carefully crafted limitation on the categorical rule for land articulated in *Lucas*.

B. A *Per Se* Taking Should Never Be Found Where, as Here, Application of the Traditional Ad Hoc Balancing Test Would Produce a Different Result.

In cases within the narrow rules outlined in *Loretto* and *Lucas*, the weighing of factors called for by *Penn Central* is unnecessary because the existence of a taking is obvious. As petitioners themselves concede, "the *per se* test truncates the fuller *Penn Central* analysis of all surrounding factors only where those factors cannot possibly alter the conclusion that a taking has occurred." Pet. Br. 16.

Due to the danger that categorical approaches will lead to unjust results, this Court very recently reiterated its concerns about creating or expanding *per se* takings rules. In *Tahoe-Sierra Preservation Council*, the Court emphasized that "[t]he 'temptation to adopt what amount to per se rules in either direction must be resisted.'" 122 S.Ct. at 1489, quoting *Palazzolo*, 533 U.S. at 636 (O'Connor, J., concurring). The Court rejected a request that it adopt a *per se* rule for reviewing planning moratoria as "simply 'too blunt an instrument'" for identifying cases in which a taking has occurred. *Id.* at 1489, quoting *Palazzolo*, 533 U.S. at 628.

Application of the *Penn Central* factors to the Washington State IOLTA rule demonstrates that there is no

taking in this case. As discussed in respondents' briefs, those factors – especially the absence of any economic impact on the client and the lack of any "reasonable investment-backed expectation" that interest on small or very short-term accounts would be both unregulated and would inure to the client – demonstrate that no taking has occurred under *Penn Central*. It would, therefore, be unjust to find a taking under a truncated *per se* test.

Moreover, a *per se* rule in this case would clash with the guiding principle for evaluating takings claims, *i.e.*, that "some people alone" should not be singled out "to bear public burdens" which in fairness should be borne by the general public. *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Petitioners turn *Armstrong* on its head. Petitioners themselves point out that any alleged burdens resulting from IOLTA programs are so small that they "may go unnoticed and unopposed," (Pet. Br. 32); and indeed there is no economic burden. IOLTA programs are effective because they apply to large numbers of people and rely on pooling of minuscule amounts of money obtained from each individual deposit.[6] Petitioners therefore contort *Armstrong* when they assert that IOLTA programs are not only takings, but *per se* takings.

[6] The Washington program, for example, generates roughly $3,000,000 per year (Pet. App. 7a) by accumulating the gross interest from a very large number of deposits, such as petitioner Brown's alleged $5 in interest (Pet. App. 34a).

C. Petitioners' *Per Se* Rule Would Disregard a Consensus Among the States and Invite Judicial Oversight of State Policy Choices.

In a remarkable display of consensus, each of the fifty States has enacted a statute or rule that requires or permits attorneys to establish IOLTA accounts from which interest is distributed to support programs that advance the administration of justice. Against this background, petitioners' argument that there is a confiscatory "character" in this governmental action that "alone" demonstrates "the Washington IOLTA program to be a *per se* taking," is incongruous and unsupportable. *See* Pet. Br. 15. The Court should firmly reject petitioners' invitation to announce a categorical rule so at odds with the reasonable determinations of the fifty States.[7]

To date, *per se* takings rules have been reserved for circumstances in which the government destroys a fundamental, well-established property right. *See Loretto*, 458 U.S. at 435 (permanent physical occupation of property is "perhaps the most serious form of invasion of an owner's property interests"); *Lucas*, 505 U.S. at 1028 (elimination of "all economically valuable use" of land "is inconsistent

[7] The great majority of the States established their IOLTA programs through a rule adopted by the State's highest court. *Phillips*, 524 U.S. at 159-60 n.1. When a State's highest court promulgates rules regulating the practice of law, the court rules constitute "state" policy in the same manner as legislatively-enacted programs. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 734 (1980) (finding that Virginia Supreme Court exercised "the State's entire legislative power with respect to regulating the Bar").

with the historical compact recorded in the Just Compensation Clause that has become part of our constitutional culture"). That IOLTA rules upset no similarly settled expectations is reflected in the considered judgments of the courts and legislatures of the fifty States that have implemented the rule. *See, supra,* at 2-3.[8] Because a national consensus has developed affirming the propriety of attorneys' maintaining IOLTA accounts, petitioners cannot credibly maintain that the "character" of the programs is so repugnant to existing property rights and expectations that a *per se* taking must be found.

Moreover, petitioners' *per se* rule would override the will of a State based exclusively on judicial evaluation of the "character" of an IOLTA rule, bypassing evaluation of more objective factors such as the rule's economic impact and whether it upsets clients' reasonable investment-backed expectations. So enlarging the reach of the Takings Clause would seriously undermine the "[d]ual sovereignty" that "is a defining feature of our Nation's constitutional blueprint." *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864, 1870 (2002). Indeed, because petitioners are patently unable to demonstrate any economic loss under the Washington IOLTA rule, their challenge to the "character" of the IOLTA program reduces to nothing more than their personal disagreement with the important public purposes it serves. Petitioners now ask the Court to enshrine this

[8] These determinations accord with settled common law under which a trustee has no obligation to pay interest to a beneficiary unless the principal in the trust earns interest that exceeds the costs of trust administration. 2A Scott on Trusts, §§ 181, 182 (1987 and 2002 Supp.).

disagreement in a *per se* rule under the Takings Clause. But the Court has long recognized that it does not "sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions." *Griswold v. Connecticut* 381 U.S. 479, 481-82 (1965). *Cf. Williamson v. Lee Optical of Oklahoma, Inc.* 348 U.S. 483, 488 (1955) ("The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought. . . . "). The Court should reject petitioners' proposed *per se* rule as a direct invitation to improper judicial review of the reasonable policy choices of the States in enacting IOLTA programs.

D. If a *Per Se* Test Is Extended to Rules, Like IOLTA, That Affect Only the Use of Intangible Personal Property But Have No Economic Impact, Virtually Any Police Power Regulation Could Be Subject to Challenge Under the Takings Clause.

The application of a *per se* taking rule to the Washington IOLTA program – which imposes no financial burden on clients – would disrupt established government practice to an extraordinary degree. Indeed, the Court has "recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values" without effecting a taking. *Penn Central Transportation Co.*, 438 U.S. at 124. Petitioners' proposed rule contravenes this precedent.

Petitioners' attempt to limit their *per se* rule to alleged appropriations of money is wholly unhelpful. In *Sperry*

Corp., the Court observed that a categorical takings rule for monetary exactions may have untoward results, stating: "If the deduction in this case was [construed to be] a physical occupation, so would be any fee for services. . . ." 493 U.S. at 62. Petitioners' expansive rule could implicate any direct or indirect financial assessment by the government – a long list that could extend from general taxes and user fees to mandatory bar dues, public library fines and parking tickets – even though the Court has rejected claims asserting an uncompensated taking in many such circumstances. *See, e.g., City of Pittsburgh v. Alco Parking Corp.*, 417 U.S. 369, 376 (1974) (rejecting claim that 20% gross receipts tax on commercial parking lots was a taking, even if the tax was "so high as to threaten the existence of an occupation or business").[9] Petitioners' proposed rule would also call into question settled modes of business regulation, such as laws restricting rates companies charge to consumers or rents landlords charge tenants, even though these laws have routinely been upheld against constitutional challenges. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 768-70 (1968)

[9] *Branch v. United States*, 69 F.3d 1571 (Fed. Cir. 1995), illustrates one of many takings claims that would spring from petitioners' *per se* rule. There, a bank asserted that the government's seizure of assets to offset losses of another bank owned by the same bank holding company constituted a *per se* taking. The court rejected the claim, explaining that the taking of money through taxes or assessments has never been subject to a *per se* analysis by this Court: "[E]ven though taxes or special municipal assessments indisputably 'take' money from individuals or businesses, assessments of that kind are not treated as *per se* takings under the Fifth Amendment." *Id.* at 1576-77 (collecting Supreme Court cases rejecting takings challenges to taxes and assessments).

(upholding natural gas rate setting); *Bowles v. Willingham*, 321 U.S. 503, 516-19 (1944) (rejecting takings challenge to rent control).

Petitioners urge that the State effects a *per se* taking even when its regulation of client trust accounts affects only non-economic interests – namely, the right "to control the uses to which their property is put." Pet. Br. 33, 35. Virtually *any* regulation of client trust accounts under a State's code of professional responsibility – indeed, even the simple requirement that such funds be maintained in a bank, as opposed to the office safe – affects such a right to control uses. Petitioner's proposed *per se* rule would thus significantly disrupt amici States' traditional authority to regulate the practice of law. *See Leis*, 439 U.S. at 442.

Petitioners' proposed *per se* rule would frustrate even well-settled uses of the police power to protect public health, safety and welfare, and would leave the States entirely unable to gauge the limits of their regulatory authority. If, as petitioners argue, a *per se* taking can be found based purely on the "character" of a governmental action, federal courts will be asked to sit in review of the "character" of virtually any regulation that affects an owner's use of property, but does not diminish the property's value or the owner's actual (or even potential) return on investment. Such an expansion of the *per se* takings doctrine "would undoubtedly require changes in numerous practices that have long been considered permissible exercises of the police power." *Tahoe-Sierra Preservation Counsel*, 122 S.Ct. at 1485. Petitioners' proposed rule is utterly out of place in the Court's settled takings jurisprudence, and should be rejected.

II. THERE IS NO CONSTITUTIONAL VIOLATION TO BE REMEDIED THROUGH INJUNCTIVE RELIEF.

A. The Takings Clause Is a Compensatory Constitutional Provision Rather Than a Substantive Limit on Government Power.

The Fifth Amendment's Takings Clause does not ban government from taking private property for public use. Rather, the Fifth Amendment conditions the right to take private property for public use on payment of "just compensation" for the property taken.[10] "This basic understanding of the Amendment makes clear that it is designed not to limit the governmental interference with property rights *per se*, but rather to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (emphasis in original).

The compensatory nature of the Takings Clause was recently emphasized by the Court in *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999). There, the Court recognized that so long as a compensatory remedy exists, the Fifth Amendment is not violated:

> The constitutional injury alleged, therefore, is not that property was taken but that it was

[10] This does not mean that there are no limits on the government's right to take property. The Fifth Amendment requires that private property be taken only for a "public use." The Due Process Clauses of the Fifth and Fourteenth Amendments provide additional limitations on government's power to take and use private property. These other substantive limitations are not, however, before the Court in this case.

> taken without just compensation. Had the city paid for the property or had an adequate post-deprivation remedy been available, Del Monte Dunes would have suffered no constitutional injury from the taking alone.

Id. at 709. The Court observed this same principle in *Williamson Planning Commn. v. Hamilton Bank*, 473 U.S. 172 (1985), in considering the ripeness of a takings claim for adjudication: "Because the Fifth Amendment proscribes takings without just compensation, no constitutional violation occurs until just compensation has been denied." *Id.* at 194.

Nevertheless, petitioners focus on injunctive relief rather than compensation, thereby revealing their real agenda: using the Takings Clause to challenge governmental policy with which they disagree. As pointed out by Justice Kennedy, however, the judiciary should invoke the Takings Clause only to ensure that property owners are compensated for the taking of their property, but not to review the validity of governmental policy:

> The imprecision of our regulatory takings doctrine does open the door to normative considerations about the wisdom of government decisions. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980) (zoning constitutes a taking if it does not substantially advance legitimate state interests). This sort of analysis is in uneasy tension with our basic understanding of the Takings Clause, *which has not been understood to be a substantive or absolute limit on the Government's power to act*. The Clause operates as a conditional limitation, permitting the Government to do what it wants so long as it pays the charge. The Clause

> presupposes what the Government intends to do is otherwise constitutional. . . .

Eastern Enterprises v. Apfel, 524 U.S. at 545 (Kennedy, J., concurring in the judgment and dissenting in part) (emphasis added). Thus, petitioners' request for injunctive relief against the Washington IOLTA Program is entirely misplaced, given that the Takings Clause is not intended to limit government's ability to act, but is instead intended only to ensure that government pay for the impacts of certain actions.

B. There Is No Unconstitutional Taking Within the Meaning of the Takings Clause Unless the Property Owner Is Entitled to Just Compensation.

In urging that injunctive relief is an appropriate remedy in this case, petitioners seek to edit the twelve-word Takings Clause to nine by excising the requirement that prohibited takings be "without just compensation." This edit allows petitioners to interpose injunctive relief as a "remedy" for their novel constitutional claim. But it is not enough that petitioners assert that there has been a deprivation of a property interest; to establish a constitutional injury they must also show that the deprivation has been "without just compensation." Where just compensation is zero, there is no Takings Clause injury, and no ground for providing injunctive relief under that clause.

This conclusion is compelled by "the guiding principle of just compensation," which is to put the property owner "'in as good a position pecuniarily as if his property had not been taken.'" *United States v. Virginia Electric Co.*,

365 U.S. 624, 633 (1961), quoting *Olson v. United States*, 292 U.S 246, 255 (1934). The Takings Clause thus requires a financial loss. And it is solely concerned with the *owner's* loss. *See Boston Chamber of Commerce v. City of Boston*, 217 U.S. 189, 195 (1910) ("[The question is] What has the owner lost? not, What has the taker gained?"). A necessary corollary is that there is no constitutional guarantee that the owner of property taken by the government is entitled to a remedy under the Takings Clause; the owner must show that she suffered a pecuniary loss to invoke that clause.

Although in most instances when government takes private property for public use the owner loses a property interest of some value, this is not always the case. This Court recognized the possibility of a government taking of property where no compensation is due, and thus no Takings Clause violation occurs, in *Marion & R.V.R. Co. v. United States*, 270 U.S. 280 (1926). In *Marion*, the Court considered whether a federal order authorizing government use of railroads during World War I constituted a taking of the Marion Railroad's property. Justice Brandeis, writing for a unanimous Court, found it unnecessary to consider whether a taking had occurred because, even if the government did take the railroad's property, no compensation was due for the taking. "Nothing was recoverable as just compensation because nothing of value was taken from the company; and it was not subjected by the Government to pecuniary loss." *Id.* at 282. Underscoring the fact that the Takings Clause is a compensation clause, *Marion* went on to stress that there was "[n]o evidence . . . that the alleged taking had subjected the company to any pecuniary loss or had deprived it of anything of pecuniary value." *Id.* at 286.

A common circumstance where government takes property but owes nothing as just compensation is the taking of easements appurtenant to a dominant estate. Where the easement taken is not needed by the dominant estate, such as where the easement grants a right to ingress and egress and other methods of ingress and egress are available, the value of what is taken from the owner of the easement will be small or non-existent, even if the gain to the government in obtaining the easement is great. In these cases, the owner of the easement cannot enjoin the government project. The owner instead essentially receives nothing as just compensation. *See, e.g., Gilmore v. State*, 143 N.Y.S.2d 873 (Ct. Cl. 1955) (nominal compensation of $1.00 for condemnation of easements and rights of way of no benefit to landowners); *Redevelopment Agency v. Tobriner*, 215 Cal.App.3d 1087 (1989) (court ordered nothing as just compensation for condemnation of valueless nonexclusive easements); Restatement (First) of Property, § 508, com. c, illus. 2 (market value of dominant estate not affected by taking of easement since public way established by condemnation is fully as serviceable as easement right of way; owner of dominant estate entitled to no award for taking of easement).

The principle that the remedy for a taking of property is compensation that represents the pecuniary loss, if any, suffered by the owner is also illustrated in *Loretto*. The Court's remand in *Loretto* for a determination of just compensation, without discussion of equitable relief to bar enforcement of the statute, points to an understanding that a taking by itself warrants no "remedy" other than a

determination of just compensation.[11] The mere fact that the property owner's loss as a result of a taking is small or non-existent does not change the basic stricture of the Fifth Amendment that only those takings that are without "just compensation" are prohibited.

C. Injunctive Relief Is Unavailable Because the Washington State Courts Can, and Should, Decide Any Question of Just Compensation.

Petitioners have suffered no loss as a result of the IOLTA program and thus are due no compensation. If there is any question that this is the case, however, petitioners' remedy is not injunctive relief. Rather, their remedy is a state court action for determination of the amount, if any, of compensation due.

The general rule regarding the unavailability of injunctive relief in takings cases was established in *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1016 (1984): "Equitable relief is not available to enjoin an alleged taking of private property for public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking."

There is only one circumstance where this Court has indicated that injunctive relief might be available to

---

[11] The subsequent history of *Loretto* reveals that the statutory nominal compensation of $1.00 was more than enough to compensate Loretto for the minor physical invasion of her property. *See Loretto v. Group W. Cable*, 522 N.Y.S.2d 543, 546 (Sup. Ct. 1987).

address an otherwise legitimate taking: where no mechanism exists to obtain just compensation. *See, e.g., Preseault v. ICC*, 494 U.S. 1, 13 (1990) ("All that is required is the existence of a reasonable, certain and adequate provision for obtaining just compensation at the time of the taking"); *cf. Eastern Enterprises*, 424 U.S. at 521 (plurality) (injunction permitted where "monetary relief against the government [was] not an available remedy").[12] Although petitioners base their request for injunctive relief in part on the asserted lack of an adequate provision in Washington's IOLTA program for obtaining just compensation, it is simply not true that petitioners lack a *mechanism* for determination of just compensation. Property owners can seek just compensation in state court. *See, e.g., Sintra v. City of Seattle*, 829 P.2d 765 (Wash. 1992). Moreover, it is petitioners' burden to demonstrate that the state inverse condemnation procedure is "unavailable or inadequate"; until they have "utilized that procedure," petitioners have no right to relief. *Williamson Planning Commn.*, 473 U.S. at 196-97; *cf. Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 14-15 (1987) (federal plaintiff challenging state court post-judgment procedures has burden to show that state law barred presentation of its claim).

[12] The Court did not establish a general rule that injunctive relief is appropriate to address a taking in *Babbitt v. Youpee*, 519 U.S. 234 (1997). Although the Court affirmed the lower court's entry of declaratory and injunctive relief in *Youpee*, the parties did not raise and the opinion does not address, explain or discuss the propriety of injunctive relief to address a taking. The affirmance regarding remedy is therefore best viewed as dicta rather than a new rule that property owners may choose either injunctive relief or just compensation in response to a government taking.

As the Court recognized in *Williamson*, 473 U.S. at 194-95 and n.14, the channeling to state court of suits alleging injury to property is analogous to the *Parratt-Hudson* doctrine in the procedural due process context. *See Parratt v. Taylor*, 451 U.S. 527 (1981) and *Hudson v. Palmer*, 468 U.S. 517 (1984). Under that doctrine, as here, state courts are the proper venue where parties allege state-caused injuries to property and "there is no federal wrong unless the state judicial system is unavailable." *SGB Financial Services, Inc. v. City of Indianapolis*, 235 F.3d 1036, 1038 (7th Cir. 2000) (Easterbrook, J.). Federal involvement is reserved for situations where no adequate state process is available to address the injury. *See Albright v. Oliver*, 510 U.S. 266, 284-85 (1994) (Kennedy, J., joined by Thomas J., concurring in judgment); *Zinermon v. Burch*, 494 U.S. 113, 139-151 (1990) (O'Connor, J., dissenting).

It would particularly disturb sovereign state interests to permit petitioners to bypass the state court in favor of federal injunctive relief. Although petitioners do not specify the form of equitable relief they seek, the likely possibilities are problematic. A federal court order that limits or restructures the IOLTA program – especially by a claim under the Takings Clause – would offend core principles of comity and federalism. *See Rizzo v. Goode*, 423 U.S. 362, 378 (1976) ("Where, as here, the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the 'special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'"), quoting *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951). Any effort to obtain a compensation determination in federal court, either directly, or indirectly through an injunction, would

be barred by the Eleventh Amendment. *See Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 400 (1979). *See also* Pet. Br. 45 n.23 (noting Eleventh Amendment bar to federal court suit against a State for compensatory relief).

Petitioners cannot show that Washington lacks a state court mechanism for determination of just compensation. Nor can petitioners show that Washington state courts will not follow this Court's Takings Clause jurisprudence such that federal intervention enjoining the IOLTA program is warranted. Rather, it appears that petitioners' real concern is not that they lack a mechanism for determination of just compensation, but that just compensation in their case will be nothing. That fact does not, however, allow them to bypass a state court determination of this issue and invoke federal equitable power to limit the State's IOLTA program. *Cf. SGB Financial Services, Inc.*, 235 F.3d at 1038. As long as a state procedure is available, as it is here, petitioners are not entitled to federal injunctive relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

BILL LOCKYER
Attorney General of California
RICHARD M. FRANK
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
*DANIEL L. SIEGEL
Supervising Deputy Attorney General
CHRISTIANA TIEDEMANN
Deputy Attorney General
1300 I Street
Sacramento, CA 95814
Telephone: (916) 323-9259
Counsel of Record

THOMAS F. REILLY
Attorney General of Massachusetts
WILLIAM W. PORTER
AMY SPECTOR
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
Telephone: (617) 727-2200

[Additional counsel listed on inside front cover]